Filed 2/14/19 P. v. Bagwell CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT THOMAS BAGWELL, Defendant and Appellant.	H044526 (Monterey County Super. Ct. No. SS151544)

I. INTRODUCTION

Defendant Robert Thomas Bagwell appeals after a jury found him guilty of possession of a billy club (Pen. Code, § 22210; count 1);[1] possession of a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a); count 3); possession of a firearm by a felon (§ 29800, subd. (a)(1); counts 4-6); possession of a short-barreled shotgun (§ 33215; count 7); possession of ammunition by a person prohibited from owning or possessing a firearm (§ 30305, subd. (a)(1); count 8); possession of a firearm by a person convicted of section 242 within the past 10 years (§ 29805; count 9); possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); count 10); and possession of drug paraphernalia (Health & Saf. Code, § 11364, subd. (a); count 11). The trial court sentenced defendant to serve six years eight months in prison.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

On appeal, defendant contends: (1) his trial counsel was ineffective for failing to object to the admission of certain prior convictions for impeachment purposes; (2) his trial counsel was ineffective for failing to object to the consolidation of the charges; (3) the cumulative effect of his trial counsel's failures prejudiced him; and (4) the trial court erred when it did not stay several sentences pursuant to section 654. Defendant asserts that the trial court should have stayed the sentences imposed for two of his convictions of possession of a firearm by a felon (counts 4 and 6), his conviction of possession of ammunition by a person prohibited from owning or possessing a firearm (count 8), and his conviction of possession of drug paraphernalia (count 11).

For reasons that we will explain, we will reverse the judgment because we determine that the trial court failed to stay one of the sentences imposed for defendant's possession of a firearm by a felon and because it failed to stay the sentence imposed for defendant's possession of drug paraphernalia. We reject defendant's remaining contentions.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant was originally charged in three separate matters. The first case involved a weapon charge, an ammunition charge, and two drug charges stemming from a police search of defendant's property on May 23, 2015. The second case charged defendant with exhibiting a deadly weapon on June 10, 2015. The third case involved a drug charge, several firearm charges, and an ammunition charge stemming from a police search of defendant's property on December 16, 2015. Before trial, the prosecution's motion to consolidate the charges was granted without objection.

A. *The People's Case*

1. May 23, 2015: Counts 1, 2, 10, and 11

On May 23, 2015, Soledad Police Officer Daniel Martinez served a search warrant at 210 Second Avenue in Soledad. Defendant and his girlfriend were in the residence when the warrant was executed. The house had three bedrooms.

The southeast bedroom contained two dressers and two nightstands, with a nightstand on each side of the bed. A cellular phone belonging to defendant's girlfriend was on top of one of the nightstands. Defendant's wallet and identification card were on top of the other nightstand. Also on top of that nightstand was a plastic pill bottle containing 0.1 grams of methamphetamine and a glass methamphetamine pipe. A second pill bottle on the nightstand contained an additional 0.1 grams of methamphetamine. A billy club was found between the nightstand and the bed. Marijuana seeds were found in a different plastic container in the bedroom. Men's and women's clothing was found in the dressers.

Officer Martinez found a live shotgun round and marijuana seedlings in the garage. Defendant's medical marijuana paperwork was posted on the back wall.

Ninety-four rounds of rifle ammunition were found in a padlocked shed. There were seven mature marijuana plants in the backyard.

2. June 10, 2015: Count 12

In June 2015, Diana Hernandez lived next door to defendant with her mother, father, husband, and three children. On June 10, 2015, Hernandez's mother was saying goodbye to Hernandez's brother, who did not live at the residence. Hernandez's mother had Hernandez's baby in her arms. Hernandez was inside her residence, and could hear defendant yelling at her brother. Another man was with defendant. Hernandez's brother left, and Hernandez could hear defendant saying "bad words" to her mother. Defendant told Hernandez's mother that she was stupid and that Hernandez's brother was a thief. Hernandez's husband, Jose Palomares, went outside. Defendant took out a knife and started walking toward Palomares, so Palomares got a metal pipe. Defendant got within five feet of Palomares and was moving the knife like he intended to "caus[e] some harm." While Hernandez was calling the police from inside the kitchen, she could see defendant lunge at her mother and baby with a knife.

Soledad Police Officer Jason Gutierrez responded to the scene and contacted defendant. Defendant stated that he had a pocket knife in each of his front pants pockets. Officer Gutierrez retrieved the two knives from defendant.

3. December 16, 2015: Counts 3-9

On December 15, 2015, Soledad Police Officer Kevin McArthur was conducting an investigation that led him into the backyard of 210 Second Street in Soledad. Through an open window, Officer McArthur observed a disassembled, sawed-off shotgun and shotgun shells in the southwest bedroom of the residence. Officer McArthur left to tell his sergeant what he saw, and when he returned to the window, he noticed that the shotgun had been removed from the bedroom. Officer McArthur obtained a search warrant for the residence while other officers ensured that no one entered the house.

Once the police had a warrant, on December 16, 2015, they contacted Sally Serna on the sidewalk outside the residence and she gave the police entry into the home. Serna and her teenaged son lived at the residence.

In the southeast bedroom, police found 17 rounds of live ammunition and a methamphetamine pipe inside a black pouch on the bed. The disassembled, saw-offed shotgun that Officer McArthur had seen earlier was also on the bed. A digital scale and two pill bottles containing a total of 2.6 grams of methamphetamine were found inside a dresser drawer.

Police located defendant in the bathroom adjoining the southeast bedroom. No one else was in the home. A black handgun was found inside a toolbox in the bathroom. The gun had a live round chambered and a fully loaded magazine.

In the southwest bedroom, police found several boxes of ammunition. Some of the ammunition was "new rifle rounds" and some of it was unspent shotgun shells. The bedroom had a desk but no bed. The third bedroom of the house, which was on the southeast side, did not appear to be occupied.

Police found a shotgun lying on the floor of the home's storage room. The shotgun had a live shotgun shell in the chamber.

B. *Defense Case*

Defendant testified that he had lived at 210 Second Street in Soledad "[p]retty much all [his] life." It was his parents' house and he and his siblings shared an interest in it. In May 2015, defendant lived at the house alone, but his girlfriend would sometimes stay there with him when he was sick.

Regarding the items found in the residence on May 23, 2015, defendant was aware that there were marijuana seeds in the house. Defendant had a "420 evaluation" to allow him to use and grow marijuana for health reasons. Defendant did not know there was ammunition in the backyard shed. The shed was generally locked and he did not have a key. The billy club found in the house did not belong to him. His father used to live in the residence and defendant had seen him with the billy club before. Defendant did not know the club was still in the house. Defendant did not know there was a shotgun round in the garage.

Police arrested defendant after the search on May 23, 2015, and he did not live in the house for eight days. While he was away, his sister and brother came to the residence and put all of his belongings in garbage bags that they placed along the fence. Defendant thought the neighbors had stolen his property, and he accused Hernandez's brother of stealing. The conversation became heated, but defendant did not take out either of his pocket knives. Hernandez's brother left and "some other guy came out of the back with a pipe in his hand." He raised the pipe over his head and came within two to three feet of defendant. Defendant pulled out a knife, but did not say anything. He did not do anything with the knife; he just held it open in his hand. The guy with the pipe ran, so defendant ran in the opposite direction.

Defendant was unaware of the three guns found on the property during the December 16, 2015 search. The ammunition found in the house was not his. At the time

of the December search, defendant's acquaintance Serna and her adult son were living in the house with him.

Defendant stated that he was convicted in 1993 for felony second degree burglary; he was convicted in 1997 for resisting arrest or giving false information to a police officer; and he was twice convicted in 2001 for felony possession of narcotics.

On cross-examination, defendant stated that he was in charge of watching the house; he kept his personal belongings there; and he paid the bills. Defendant slept in the southeast bedroom and kept some personal items in the room. He also kept some belongings in the southwest bedroom, but he rarely went into that room. Defendant was in the bathroom adjoining the southeast bedroom when police searched the house in December. He used that bathroom daily.

Defendant acknowledged that the billy club was a weapon and stated that he was aware that as a felon he was not allowed to possess ammunition or firearms.

C. *Charges, Verdict, and Sentence*

Defendant was charged with possession of a billy club (count 1; § 22210); possession of ammunition by a person prohibited from owning or possessing a firearm (counts 2, 8; § 30305, subd. (a)(1)); possession of a controlled substance while armed with a firearm (count 3; Health & Saf. Code, § 11370.1, subd. (a)); possession of a firearm by a felon (counts 4-6; § 29800, subd. (a)(1)); possession of a short-barreled shotgun (count 7; § 33215); possession of a firearm by a person convicted of section 242 within the past 10 years (count 9; § 29805); possession of a controlled substance (count 10; Health & Saf. Code, § 11377, subd. (a)); possession of drug paraphernalia (count 11; Health & Saf. Code, § 11364, subd. (a)); and exhibiting a deadly weapon (count 12; § 417, subd. (a)(1)).

A jury acquitted defendant of one count of possession of ammunition by a person prohibited from owning or possessing a firearm (count 2; § 30305, subd. (a)(1)) and of exhibiting a deadly weapon (count 12; § 417, subd. (a)(1)). The jury found defendant

guilty of the remaining charges. The trial court sentenced defendant to six years eight months.

III. DISCUSSION

A. *Ineffective Assistance of Counsel*

Defendant contends that his trial counsel was constitutionally ineffective for failing to object to the admission of several prior convictions and for failing to object to the consolidation of the charges. Defendant also asserts that he was prejudiced by the cumulative effect of his counsel's failure to object on those grounds.

1. Ineffective Assistance of Counsel: General Principles

On appeal, a defendant seeking to prove an ineffective assistance of counsel claim must show that (1) "counsel's performance fell below a standard of reasonable competence" and (2) "prejudice resulted." (*People v. Anderson* (2001) 25 Cal.4th 543, 569 (*Anderson*); see *Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*).) Thus, "[e]ven where deficient performance appears, the conviction must be upheld unless the defendant demonstrates prejudice, i.e., that, ' " 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " ' [Citations.]" (*Anderson, supra*, at p. 569.)

"[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland, supra*, 466 U.S. at p. 697; see *In re Cox* (2003) 30 Cal.4th 974, 1020.)

2. Failure to Object to the Admission of Certain Prior Convictions

Defendant asserts that his counsel was ineffective for failing to object to the trial court's ruling allowing the prosecution to impeach him with his 1997 misdemeanor resisting arrest conviction and his 2001 felony possession of a controlled substance convictions.[2]

a. Trial Court Proceedings

Before trial, the prosecution filed a motion in limine to impeach defendant with the following prior convictions should he choose to testify: two 1990 misdemeanor burglary convictions; a 1991 misdemeanor petty theft with a prior conviction; a 1992 felony petty theft with a prior conviction; a 1993 felony second degree burglary conviction; a 1994 misdemeanor assault conviction; a 1997 misdemeanor resisting arrest conviction; and two 2001 felony possession of a controlled substance convictions.[3]

In response, defense counsel objected to the use of any prior conviction that was not being offered to support the charged offenses—i.e., offenses such as possession of ammunition by a felon where the prosecution had to prove that defendant had suffered a prior conviction as an element of the offense.[4] Defense counsel also observed that the convictions from 1990 and 1991 were "very old." Defense counsel stated that the

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[2] Defendant also asserts that his counsel was ineffective for failing to object to the trial court's admission of his 1991 petty theft with a prior conviction. Although the trial court initially ruled that the prosecution could impeach defendant with that conviction, it ultimately disallowed its use for impeachment purposes.

[3] The prosecution's motion in limine listed the prior convictions as follows: "(1) 1990 – 459 - convicted two counts misdemeanor"; "(2) 1991 – 484/666 – misdemeanor"; "(3) 1992 – PC 666/484 – convicted felony"; "(4) 1993 – 459 2nd – convicted felony"; "(5) 1994 – 245(a)(1) – misdemeanor"; "(6) 1997 – 148 – misdemeanor"; "(7) 2001 – 11350 – felony"; and "(8) 2001 – 11350 – felony."

[4] Defendant stipulated to the truth of the prior convictions alleged in the information at the outset of trial. Defendant stipulated to the following convictions: (1) sections 484/666 on July 7, 1992; (2) section 459 on January 21, 1993: (3) Health and Safety Code section 11350 on August 27, 2001; and (4) Health and Safety Code section 11350 on August 27, 2001.

prosecution "certainly [had] at least four prior convictions that they could use as impeachment evidence" and requested the court to exclude "a number" of the prior convictions "because they are remote in time."

The trial court initially ruled that the prosecution could impeach defendant with the 1991 misdemeanor petty theft with a prior conviction, the 1993 felony second degree burglary conviction, the 1997 misdemeanor resisting arrest conviction, and both of the 2001 felony possession of a controlled substance convictions. The court specified that the 1997 resisting arrest conviction was "important so that the jurors have an understanding of the defendant's propensity or character for putting his own interests above those of the others, which is relevant for credibility."

The trial court revisited its ruling during trial. The court decided to disallow the prosecution from impeaching defendant with the 1991 misdemeanor petty theft with a prior conviction because it was too remote and of little probative value. However, the court ruled that the prosecution could impeach defendant with the 1993 felony second degree burglary conviction, the 1997 misdemeanor resisting arrest conviction, and both of the 2001 felony possession of a controlled substance convictions. The court limited the evidence admitted for impeachment to "the date of the conviction . . . and whether it was a felony or misdemeanor," which "include[d] the description and the code section."

On direct examination, defendant testified that he was convicted in 1993 for felony second degree burglary; he was convicted in 1997 for resisting arrest or giving false information to a police officer; and he was twice convicted in 2001 for felony possession of narcotics. Defendant acknowledged those convictions again during cross-examination. No evidence was presented as to the underlying facts of the convictions.

b. Analysis

Defendant asserts that his trial counsel was ineffective for failing to object to the admission of both of his 2001 felony possession of a controlled substance convictions and his 1997 misdemeanor resisting arrest conviction because simple possession of a

controlled substance and resisting arrest are not crimes of moral turpitude. He further contends that his trial counsel was ineffective for failing to object to the admission of the 1997 misdemeanor resisting arrest conviction because only the underlying facts of a misdemeanor conviction are admissible, not the record of conviction itself. Defendant asserts that there could have been no tactical reason for his counsel's failure to object on these grounds because counsel objected generally to the admission of the prior convictions.

Defendant contends that he was prejudiced by the convictions' admission because out of the four prior convictions admitted for impeachment purposes, only one was legally admissible and the case turned on his credibility. Defendant also asserts that the prejudicial effect of the improper impeachment was heightened by the fact that the two 2001 possession of a controlled substance convictions were for the same offense as that charged in count 10 and were similar to the offenses charged in counts 3 (possession of a controlled substance while armed with a firearm) and 11 (possession of drug paraphernalia). The Attorney General contends that defendant has not demonstrated he was prejudiced by the convictions' admission.

Subject to a trial court's exercise of discretion under Evidence Code section 352, evidence of a felony conviction for an offense involving moral turpitude is admissible for impeachment purposes in any criminal proceeding. (*People v. Castro* (1985) 38 Cal.3d 301, 313, 315-317 (*Castro*); Cal. Const., art. I, § 28, subd. (f)(4).) "Misdemeanor convictions themselves are not admissible for impeachment, although evidence of the underlying *conduct* may be admissible subject to the court's exercise of discretion. [Citation.]" (*People v. Chatman* (2006) 38 Cal.4th 344, 373.) The reason for this rule is that "misdemeanor convictions are inadmissible hearsay when offered to prove the underlying criminal conduct." (*People v. Wheeler* (1992) 4 Cal.4th 284, 298 (*Wheeler*).)

"The California Supreme Court has divided crimes of moral turpitude into two groups. [Citation.] The first group includes crimes in which dishonesty is an element

(i.e., fraud, perjury, etc.). The second group includes crimes that indicate a ' "general readiness to do evil," ' from which a readiness to lie can be inferred. [Citation.]" (*People v. Chavez* (2000) 84 Cal.App.4th 25, 28.)

We agree with defendant that simple possession of a controlled substance is not a crime of moral turpitude, rendering both of his 2001 narcotics convictions inadmissible for impeachment purposes. (See *Castro, supra,* 38 Cal.3d at p. 317.) We also agree that defendant could not be properly impeached with his 1997 misdemeanor conviction for resisting arrest.[5] (See *Wheeler, supra,* 4 Cal.4th at p. 298.) However, we conclude that, based on the evidence presented at trial and the jury's verdicts, defendant has not established there is a reasonable probability that " ' " 'the result of the proceeding would have been different' " ' " had he not been impeached with those convictions. (*Anderson, supra,* 25 Cal.4th at p. 569.)

The evidence against defendant was strong. Police twice searched the property at 210 Second Street in Soledad in 2015, and on both occasions they found illicit items. On May 23, 2015, the police located methamphetamine, a methamphetamine pipe, and a billy club in the southeast bedroom. The methamphetamine and pipe were on top of a nightstand along with defendant's wallet. The billy club was found between the bed and the nightstand. Defendant testified that he was living at the residence on that date and that he slept in the southeast bedroom.

On December 16, 2015, police found ammunition, a methamphetamine pipe, and a disassembled, sawed-off shotgun on the bed in the southeast bedroom. Methamphetamine was found inside a dresser drawer. Defendant was located in the bathroom adjoining the southeast bedroom, approximately six feet away from the dresser.

[5] Because we determine that the 1997 resisting arrest conviction was inadmissible as a misdemeanor, we do not reach defendant's claim that the conviction was also inadmissible because resisting arrest is not a crime of moral turpitude.

Looking through a window, Officer McArthur had initially observed the sawed-off shotgun in the southwest bedroom, but when he returned to the residence after leaving to get a warrant, he saw that the shotgun had been moved out of sight. Other officers had waited at the residence to ensure that no one else entered while Officer McArthur applied for the warrant. Defendant was the only person found in the house during the ensuing search.

Police also found a handgun inside of a toolbox in the same bathroom where defendant was located. Defendant testified that he used that bathroom on a daily basis. Boxes of ammunition were found in the southwest bedroom, which did not have a bed, and another shotgun was found "lying on the [storage room] floor in plain sight from the door." A photograph admitted into evidence showed the shotgun lying on the floor in plain sight.

Given the strength of the evidence, even though the improperly admitted 2001 narcotics convictions were for the same offense as that charged in count 10 and were similar to the offenses charged in counts 3 and 11, and defendant was also improperly impeached with his 1997 misdemeanor resisting arrest conviction, we conclude that the result of the proceedings would not have been different had the convictions not been admitted. Moreover, we observe that although defendant denied during his testimony that some of the items recovered by the police were his, such as the ammunition found in the padlocked shed in May, he did not address the methamphetamine found during the searches. In addition, the prosecution's impeachment of defendant with his 1993 felony burglary conviction was proper.

In addition to the strong evidence of guilt, the jury's verdicts warrant against a finding of prejudice here. The jury's acquittal of defendant on two counts demonstrates that the jury believed portions of defendant's testimony despite the admission of the convictions. Regarding the ammunition found by police in the padlocked shed in May, defendant testified that he did not have access to the shed, and the jury acquitted him of

that offense. Regarding the June 10, 2015 exhibiting a deadly weapon charge, defendant testified that he did not take out his knife until one of the neighbors walked toward him with a pipe and that he did not point the knife in anyone's direction, and the jury acquitted him of that offense, too.

Defendant likens this case to *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1524 (*Lopez*), where this court determined that a trial counsel's failure to object to the improper impeachment of defense witnesses contributed to the prejudice necessitating reversal.[6] That case, however, involved charges of misconduct by the defendant (resisting or attempting to deter the performance of an executive officer, disturbing the peace, battering a peace officer, and resisting a peace officer) and the evidence against him consisted solely of the testimony of prosecution witnesses. (*Id.* at pp. 1514-1519.) Unlike here, there was no physical evidence. Also unlike here, the *Lopez* jury found the defendant guilty as charged. (*Id.* at p. 1520.)

For these reasons, we conclude that defendant has not demonstrated a reasonable probability that the result of the trial would have been different had he not been impeached with both of his 2001 convictions of simple possession of a controlled substance and his 1997 conviction of resisting arrest, such that our confidence in the outcome of the proceedings is undermined.

3. Failure to Object to Consolidation

Defendant next contends that his trial counsel was ineffective for failing to object to the consolidation of the June 10, 2015 exhibiting a deadly weapon charge with the other charges.[7] Defendant asserts that his counsel should have objected to the

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[6] The *Lopez* defendant was also prejudiced by the trial court's improper instruction on oral admissions and his trial counsel's failure to object to the improper admission of his invocation of the right to counsel. (*Lopez, supra*, 129 Cal.App.4th at p. 1527.)

[7] Defendant does not contend that his counsel should have objected to the consolidation of the May 23, 2015 and December 16, 2015 charges, asserting instead that "[i]t is arguable that the two felony complaints were properly joined . . . ."

consolidation because exhibiting a deadly weapon was not in the same class of offenses as the remaining drug, ammunition, and weapons charges; the exhibiting a deadly weapon charge was not connected in its commission to the other offenses; and the evidence of exhibiting a deadly weapon was not cross-admissible with the other charges. Defendant maintains that he was prejudiced by the consolidation because the exhibiting a deadly weapon charge involved the only evidence of him using a weapon and the circumstances of the offense were inflammatory.

" 'The law prefers consolidation of charges.' [Citation.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 574.) Section 954 provides for joinder of "two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses." "The purpose underlying this statute is clear: joint trial 'ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials.' [Citation.]" (*People v. Soper* (2009) 45 Cal.4th 759, 772.) Nevertheless, a trial court may exercise its discretion to deny joinder "in the interests of justice and for good cause shown . . . ." (§ 954.)

Courts have broadly construed the phrase "connected together in their commission." (§ 954.) "[O]ffenses which are committed at different times and places against different victims are nevertheless 'connected together in their commission' when they are . . . linked by a ' "common element of substantial importance." ' " (*People v. Lucky* (1988) 45 Cal.3d 259, 276.) Crimes are also considered to be " 'connected together in their commission' " when there is a "close temporal and spatial relationship . . . ." (*People v. Smith* (2007) 40 Cal.4th 483, 510, 511.)

Here, we are not convinced that defense counsel's failure to object to the consolidation of the charges amounted to deficient performance. Arguably, there was a common element linking the exhibiting a deadly weapon count to several of the other charges, namely, the possession of a weapon. In addition, there was a close temporal and

spatial relationship between the offenses as they all allegedly occurred within six months of each other and either just outside of defendant's property (the exhibiting a deadly weapon charge) or on the property (the remaining charges). (See *People v. Stewart* (1985) 165 Cal.App.3d 1050, 1058 [proper to join murder and robbery charges involving different victims where the offenses occurred during a one-month period and therefore grew out of a "continuing and intertwined sequence of criminal activity"].) Nor do we conclude that defense counsel could have persuaded the trial court that the interests of justice warranted the denial of joinder here. (See *People v. Arias* (1996) 13 Cal.4th 92, 126 ["When exercising its discretion, the court must balance the potential prejudice of joinder against the state's strong interest in the efficiency of a joint trial"].) Counsel is not required to make futile or baseless objections (*People v. Price* (1991) 1 Cal.4th 324, 387), and we conclude that there were not strong grounds for an objection to the consolidation here.

But even if we assume that trial counsel's failure to object to the consolidation "fell below a standard of reasonable competence," defendant's ineffective assistance claim fails because defendant cannot establish prejudice. (*Anderson, supra,* 25 Cal.4th at p. 569.) The jury acquitted defendant of exhibiting a deadly weapon. Thus, he cannot show prejudice as to that charge. (See *People v. Moore* (1986) 185 Cal.App.3d 1005, 1013.) Moreover, the jury's acquittal on the exhibiting a deadly weapon charge undermines defendant's argument that the circumstances of that offense were particularly inflammatory, and the jury's acquittal on the May 23, 2015 unlawful possession of ammunition charge (count 2) shows that "the jury clearly considered and weighed the evidence carefully as to each charge separately." (*Ibid.*) For the reasons we stated above, the evidence against defendant on the remaining counts was strong. Thus, we conclude there is not a reasonable probability that the result of the trial would have been different had the exhibiting a deadly weapon charge not been consolidated with the other charges.

4. Cumulative Effect of Ineffective Assistance of Counsel

Defendant contends that "[t]he combined effect of the ineffective assistance of counsel in failing to object on available grounds to the use of . . . multiple inadmissible convictions to impeach his testimony and failing to object to the joinder of the brandishing charge [was] also prejudicial." However, as we have explained, defendant has failed to establish that he was prejudiced by any alleged deficiency. Accordingly, "defendant's claim based upon the cumulative effect of ineffective assistance of counsel also must fail." (*People v. Smithey* (1999) 20 Cal.4th 936, 1017.)

B. *Trial Court's Failure to Stay Punishment Pursuant to Section 654*

Defendant asserts that the trial court erroneously failed to stay the punishment it imposed for several of his offenses pursuant to section 654. Defendant contends that the trial court was required to stay the punishment imposed on counts 4 and 6, for defendant's convictions of possession of a firearm by a felon, because those offenses involved the same act for which he was punished on count 3, for his possession of a controlled substance while armed with a firearm. Defendant also contends that the punishment imposed on count 8, for possession of ammunition by a person prohibited from owning or possessing a firearm, should have been stayed because the offense involved the same act and objective as count 3, possession of a controlled substance while armed with a firearm, and counts 4 and 6, possession of a firearm by a felon. Finally, defendant contends that the punishment imposed on count 11, for possession of drug paraphernalia, should have been stayed because he harbored the same objective for that offense as he did for count 10, possession of methamphetamine.

1. Trial Court Proceedings

The trial court imposed an aggregate sentence of six years eight months. At the outset of the sentencing hearing, the court stated that the case involved two separate incidents "at this point" and that consecutive sentences were warranted.

The trial court selected count 3, possession of a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a)), as the principal term and imposed the upper term of four years. The court imposed consecutive sentences of eight months each, which was one-third of the midterm, on count 1, possession of a billy club (§ 22210), and counts 4 through 6, possession of a firearm by a felon (§ 29800, subd. (a)(1)).

The trial court imposed a concurrent, midterm sentence of two years on count 8, possession of ammunition by a person prohibited from owning or possessing a firearm (§ 30305, subd. (a)(1)), because it saw that offense as "overlapping" to some degree with count 3, possession of a controlled substance while armed with a firearm. Pursuant to section 654, the trial court stayed the sentences on count 7, possession of a short-barreled shotgun (§ 33215), and count 9, possession of a firearm by a person convicted of section 242 within the past 10 years (§ 29805). The court imposed a one-year concurrent sentence on count 10, possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and a 180-day concurrent sentence on count 11, possession of drug paraphernalia (Health & Saf. Code, § 11364, subd. (a)).

2. Section 654: General Principles

Section 654, subdivision (a) states: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The California Supreme Court has long held that "[s]ection 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct." (*People v. Deloza* (1998) 18 Cal.4th 585, 591.)

" 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be

punished for any one of such offenses but not for more than one.' " (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, italics omitted.) "In such circumstances, the court must impose but stay execution of sentence on all of the convictions arising out of the course of conduct except for the offense with the longest sentence." (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338 (*McCoy*).) "[S]entences must be stayed to the extent that section 654 prohibits multiple punishment," regardless of whether the sentences are imposed concurrently or consecutively. (*People v. Jones* (2012) 54 Cal.4th 350, 353 (*Jones*).)

A trial court's finding of separate intents or objectives is "a factual determination that must be sustained on appeal if supported by substantial evidence." (*People v. Osband* (1996) 13 Cal.4th 622, 730.) This deferential standard of review applies whether the trial court's findings are explicit or implicit. (*People v. Lopez* (2011) 198 Cal.App.4th 698, 717.) "Thus, '[w]e review the trial court's finding "in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence." ' " (*Ibid.*)

3. Punishment Imposed on Counts 4 and 6

Defendant contends that section 654 required the trial court to stay the punishment imposed on counts 4 and 6, for possession of a firearm by a felon, because those offenses involved the same act as count 3, possession of a controlled substance while armed with a firearm, for which he received separate punishment. Defendant asserts that "[b]ecause the conviction for possession of a controlled substance while armed has as one of its elements control over an armed weapon, it relies on the identical act that underlies the felon-in-possession charges." Defendant does not challenge the trial court's imposition of sentence on count 5, which was also an unstayed sentence for possession of a firearm by a felon. The Attorney General concedes that of the three sentences imposed for possession of a firearm by a felon (counts 4-6), "one of [them], must be stayed," but argues that two of the sentences were properly imposed because they were "predicated on

two other guns." The Attorney General does not specify which sentence should have been stayed.

In *Jones, supra*, 54 Cal.4th 350, the California Supreme Court held that "a single possession or carrying of a single firearm on a single occasion may be punished only once under section 654." (*Id.* at p. 357.) There, the defendant was convicted of possession of a firearm by a felon, carrying a readily accessible concealed and unregistered firearm, and carrying an unregistered loaded firearm in public based on his possession of one gun. (*Id*. at p. 352.) Because the defendant's convictions "were based on a single act," section 654 precluded multiple punishment. (*Jones, supra,* at p. 360.) The court recognized, however, that "[i]n some situations, physical acts might be simultaneous yet separate for purposes of section 654." (*Id.* at p. 358.) For example, " 'simultaneous possession of different items of contraband' are separate acts" that may be subject to multiple punishment, since the possession of each item is " 'a separate act of possession.' [Citation.]" (*Ibid.*)

On the same day it decided *Jones*, the California Supreme Court decided *People v. Correa* (2012) 54 Cal.4th 331. There, the defendant was convicted of seven counts of being a felon in possession of a firearm based on his simultaneous possession of seven firearms. (*Id.* at pp. 334-335.) The court held that "section 654 does not bar multiple punishment for violations of the same criminal statute." (*Id.* at p. 334.) The court observed that "[t]his case involves multiple violations of the same statute, while the express language of section 654 applies to an act that is punishable in different ways by different provisions of law." (*Id.* at p. 337, italics omitted.) The court also observed that "a felon who possesses several firearms is more culpable than one who possesses a single weapon." (*Id.* at p. 342.)

Here, defendant was convicted of possession of a controlled substance while armed with a firearm (count 3) and three counts of possession of a firearm by a felon (counts 4-6) based on his possession of three guns on December 16, 2015. Specifically,

defendant possessed a loaded handgun found inside a toolbox in the bathroom adjoining the southeast bedroom; a disassembled, sawed-off shotgun found on the bed in the southeast bedroom; and a loaded shotgun found on the storage room floor. Although the verdict form for count 3 did not specify the firearm(s) it pertained to, the verdict form for count 4 stated that it pertained to the possession of a "handgun"; the verdict form for count 5 stated that it pertained to the possession of a "sawed off shotgun"; and the verdict form for count 6 stated that it pertained to possession of a "shotgun." The jury instructions similarly specified the particular firearm at issue in counts 4, 5, and 6.

Although the trial court's imposition of consecutive sentences on counts 3 through 6 reflects its implicit finding that those offenses did not involve a single act with a single objective (see *People v. Lopez*, *supra*, 198 Cal.App.4th at p. 717), we agree with the Attorney General that section 654 required the trial court to stay one of the sentences imposed for defendant's possession of a firearm by a felon (counts 4-6). Because possession of a controlled substance while armed with a firearm (count 3) required the possession of a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a)), and counts 4 and 6 also pertained to defendant's possession of a loaded firearm, the trial court should have stayed the punishment imposed on one of those counts. The trial court's imposition of unstayed punishment on counts 3, 4, and 6 necessarily punished defendant for possession of one of the same firearms twice, which violated section 654's proscription against multiple punishment for the same act. (See *Jones, supra,* 54 Cal.4th at pp. 357, 360.)

Defendant relies on *People v. Buchanan* (2016) 248 Cal.App.4th 603 (*Buchanan*) and *People v. Williams* (2009) 170 Cal.App.4th 587 (*Williams*) to demonstrate that section 654 required the trial court to stay the sentences imposed on both counts 4 and 6. However, *Buchanan* involved the imposition of multiple punishment for the same criminal act—the defendant's possession of a single firearm. (*Buchanan, supra,* at p. 617.) *Williams*, on the other hand, involved the defendant's possession of two

firearms, a handgun and a revolver. (*Williams*, *supra*, at pp. 596-597.) The defendant was convicted of, among other things, possession of a firearm by a felon and possession of a controlled substance while armed. (*Id.* at p. 595.) *Williams* held that the trial court erred by failing to stay the term for felon in possession of a firearm under section 654 because the trial court had explicitly found that both acts of firearm possession occurred with the same intent and objective. (*Williams*, *supra*, at pp. 645-646.) There was no such finding here, and defendant does not suggest that he harbored a single objective when possessing three separate firearms. Nor does he cite any authority that holds that simultaneous possession of multiple firearms constitutes a single act, or single course of conduct, within the meaning of section 654.

In sum, we conclude that defendant could be separately punished for his possession of each firearm, but he could not be punished more than once for each firearm possession. Accordingly, we remand the case to the trial court for resentencing so that it may stay the punishment imposed on either count 4 or 6.

4. Punishment Imposed on Count 8

Defendant contends that the trial court erred when it did not stay the punishment imposed on count 8 for his possession of ammunition by a person prohibited from owning or possessing a firearm. Defendant asserts that the conduct underlying his conviction on count 8 and the conduct underlying his convictions on counts 4 and 6 for possession of a firearm by a felon was part of "a single course of conduct with the same objective that cannot be punished twice."

Defendant relies on *People v. Lopez* (2004) 119 Cal.App.4th 132, 137-138. There, all of the ammunition possessed by the defendant was loaded into a handgun. (*Id.* at p. 135.) The trial court imposed separate punishment for the defendant's unlawful possession of a firearm and his unlawful possession of ammunition. (*Id.* at p. 137.) The Court of Appeal held that "[w]here . . . all of the ammunition is loaded into the firearm, an 'indivisible course of conduct' is present and section 654 precludes multiple

punishment." (*Id.* at p. 138.) "To allow multiple punishment for possessing ammunition in a firearm would, in our judgment, parse the [defendant's] objectives too finely. While there may be instances when multiple punishment is lawful for possession of a firearm and ammunition, the instant case is not one of them." (*Ibid.*; see also *People v. Sok* (2010) 181 Cal.App.4th 88, 100, fn. omitted ["trial court erred in failing to stay the sentences for . . . unlawful possession of ammunition . . . pursuant to section 654 because the ammunition at issue . . . was either loaded into Sok's handgun or had been fired from that gun"].)

In contrast, here, defendant possessed several caches of ammunition apart from the ammunition loaded in the firearms. Police found 17 rounds of ammunition inside a black pouch on the bed in the southeast bedroom. A disassembled, sawed-off shotgun was also on the bed. There was no evidence that the sawed-off shotgun was loaded. In addition, police found several boxes of ammunition and a bag containing ammunition in the southwest bedroom. The ammunition in the bag consisted of "assorted rifle and pistol rounds." At least one box contained "new rifle rounds," while other boxes contained "shotgun shells." Police found a loaded handgun in the bathroom adjacent to the southeast bedroom and a loaded shotgun in the storage room. Police did not find a rifle.

Substantial evidence supports the trial court's implicit finding that defendant's possession of ammunition that was not loaded in the firearms was a separate act from defendant's possession of the loaded firearms because the ammunition was a " 'different item[] of contraband.' " (*Jones*, *supra*, 54 Cal.4th at p. 358.) Substantial evidence also supports the trial court's implicit finding that defendant's intent in possessing the ammunition was independent of his intent in possessing the loaded firearms. The trial court could reasonably infer that defendant's possession of ammunition not loaded into the firearms demonstrated his intent to reload the firearms (or load the sawed-off shotgun) if he so desired. Moreover, defendant possessed rifle ammunition when no rifle was recovered during the search. The trial court could reasonably infer that defendant

possessed the rifle ammunition with the intent of obtaining a rifle from which the ammunition could be fired, or with the intent to use the ammunition in some other fashion unrelated to the firearms that were found during the search. A defendant may be punished for each statutory violation even it was part of an indivisible course of conduct if he or she harbored multiple criminal objectives independent of one another. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Moreover, defendant's conduct in possessing the ammunition was more culpable than possession of only the loaded firearms.

For these reasons, we agree with the trial court's implicit finding that defendant's possession of the ammunition and possession of the firearms were separate acts undertaken with independent objectives. Accordingly, we affirm the sentence imposed on count 8.

5. Punishment Imposed on Count 11

Defendant contends that the trial court erred when it did not stay the punishment imposed on count 11 for possession of drug paraphernalia (a pipe). Defendant argues that section 654 barred punishment for that offense in addition to the punishment imposed on count 10 for possession of a controlled substance (methamphetamine) because he "clearly possessed both the methamphetamine and the pipe, which were stored together, for the same criminal objective: namely, to smoke methamphetamine." The Attorney General counters that defendant could have possessed the pipe to smoke marijuana based on "the indicia of marijuana use found at the residence."

The pipe at issue was found inside a plastic pill bottle along with methamphetamine. The pill bottle was on top of a nightstand where police found another plastic pill bottle containing additional methamphetamine. The police officer who found the pipe testified that it was "a green methamphetamine pipe which [he] identified as a methamphetamine pipe based on [his] training and experience." He also stated that he "recognized it to be a pipe used for smoking methamphetamine." The prosecutor

repeatedly characterized the pipe as a "meth pipe" during closing argument, and also argued that defendant "obviously had the meth pipe to use to smoke the meth."

These circumstances demonstrate a single intent—namely, the intent to smoke methamphetamine—for which defendant could only be punished once. "[W]here there is a basis for identifying the specific factual basis for a verdict, a trial court cannot find otherwise in applying section 654." (*McCoy*, *supra*, 208 Cal.App.4th at p. 1339.) Thus, given the prosecutor's arguments and the evidence at trial, we conclude that substantial evidence does not support the trial court's implicit finding that defendant harbored a separate intent for possessing the pipe apart from his intent for possessing the methamphetamine. Accordingly, the trial court erred when it did not stay the sentence imposed on count 11 pursuant to section 654.

IV. DISPOSITION

The judgment is reversed and the matter is remanded for resentencing. On remand, the trial court is directed to stay pursuant to Penal Code section 654 the sentence imposed for either count 4 or count 6. The trial court is also directed to stay pursuant to Penal Code section 654 the sentence imposed on count 11. The trial court shall resentence defendant accordingly.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

DANNER, J.

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